Public Prosecutor v Tegoh bin Aling

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–20 OF 2004
NALLINI PATHMANATHAN JC
28 SEPTEMBER 2007

Criminal Law — Penal Code (Malaysia) — s 304(a) — Culpable homicide — Provocation, whether defence to charge of culpable homicide — Whether relevant instead for mitigation purposes — Whether offence wholly disproportionate to provocation received — Sentence, assessment of

Criminal Procedure — Sentence — Culpable homicide — Consideration of the public interest — Consideration of mitigating factors — Assessment of sentence

Criminal Procedure — Sentence — Mitigating factors — Accused no previous convictions — Accused pleading guilty at earliest opportunity — Brutal and violent crime — Whether discount in sentence ought to be given

Criminal Procedure — Sentence — Plea of guilty — Violent and brutal crime — Whether plea of guilty by accused warranted lesser reduction in sentence than that normally given

The accused was originally charged with the murder of his ex-wife under s 302 of the Penal Code. However, when an alternative charge of culpable homicide under s 304(a) was preferred, the accused promptly pleaded guilty and was convicted thereon. The facts of the case revealed that the ex-wife was brutally and violently killed. In mitigation, counsel for the accused pleaded several factors, including the guilty plea and lack of antecedents. Counsel submitted that the accused was gravely provoked. The deceased ex-wife had mocked and ridiculed the accused's religion, and had thrown the Holy Qu'ran at the accused. This caused the accused to lose complete control of himself and to violently attack the deceased ex-wife. The prosecution however pressed for a deterrent sentence, arguing that the violent reaction of the accused was entirely disproportionate to the provocation received.

Held, sentencing the accused to 12 years' imprisonment from the date of arrest:

(1) The provocation afforded by the deceased was of the highest degree.

The denigration of a man's religion, culminating in the throwing of the Holy Book is sufficient provocation to warrant a reasonable man losing his self-control and responding heatedly. A reasonable man here would be an ordinary man of the community from which the accused comes, in this instance the Orang Asli community. Provocation however is not a defence to a reduced charge of culpable homicide under s 304(a) of the Penal Code, though it is relevant for the purposes of mitigation (see paras 20–21).

(2) Notwithstanding the provocation, the accused had reacted wholly disproportionately to the provocation received. His brutal and violent response to his ex-wife's taunts and insults was entirely indefensible. The attack on the deceased ex-wife was both prolonged and violent. Therefore, the extent to which the provocation served to mitigate the accused's conduct was limited (see para 22).

(3) The public interest in the instant case required that consideration be given to the frequency with which offences of this nature were committed. The public interest also required that severe penalties be meted out for such offences. In favour of the accused, the court would consider the following mitigating factors: (i) the accused had no antecedents — this was a mitigating factor in the instant case notwithstanding the gravity of the offence; (ii) the plea of guilty at the earliest opportunity — while normally the reduction in sentence would be between one-quarter and one-third, the violent and brutal facts of this case warranted a lesser reduction (see paras 23–24 & 26).

(4) If the accused had not pleaded guilty at the outset and the matter had gone through a full trial, it was likely the court would have imposed a sentence of 16 years imprisonment taking into account public interest, the culpability of the accused's actions and the extent of the violence and brutality in the instant case. However, taking into further consideration the personal circumstances of the accused, the provocation afforded to him and his plea of guilt at the earliest possible opportunity available to him, the appropriate sentence was a term of imprisonment of 12 years, from the date of his arrest (see para 27).

[Bahasa Malaysia summary

Tertuduh pada asalnya dituduh membunuh bekas isterinya di bawah s 302 Kanun Keseksaan. Walau bagaimanapun, apabila pertuduhan alternatif untuk homisid salah tak terjumlah membunuh di bawah s 304(a) dibuat, tertuduh dengan segera mengaku bersalah dan disabitkan kerana itu. Fakta kes menunjukkan bahawa bekas isteri telah dibunuh dengan kejam. Dalam mitigasi, peguam bagi pihak tertuduh memplidkan beberapa faktor, termasuklah pengakuan bersalah dan tiada kesalahan lampau. Peguam

berhujah bahawa tertuduh telah diprovokasikan. Bekas isteri yang sudah meninggal dunia itu telah memperolak-olakkan dan mempersendakan agama tertuduh, dan telah membaling Al-Quran ke arah tertuduh. Ini telah menyebabkan tertuduh terus hilang kawalannya dan menyerang bekas isteri yang telah mati dengan ganas. Pihak pendakwaan bagaimanapun telah mendesak untuk hukuman pencegahan, dengan menghujahkan bahawa tindak balas ganas tertuduh tidak setimpal langsung dengan provokasi yang diterima.

Diputuskan, menjatuhkan hukuman penjara 12 tahun dari tarikh tangkapan:

(1) Provokasi yang dilakukan oleh si mati adalah di tahap melampau. Merendah-rendahkan agama seorang lelaki, sehingga membaling Al-Quran merupakan provokasi yang mencukupi untuk mewajarkan seorang lelaki yang waras hilang kawalan diri dan bertindak dengan kasar. Seorang yang waras di sini boleh merupakan orang biasa dalam masyarakat yang mana datangnya tertuduh, dalam kes ini komuniti Orang Asli. Provokasi walau bagaimanapun bukan satu pembelaan untuk pengurangan pertuduhan homisid salah tak terjumlah membunuh di bawah s 304(a) Kanun Keseksaan, meskipun ia adalah relevan bagi tujuan mitigasi (lihat perenggan 20–21).

(2) Meskipun terdapat provokasi, tertuduh telah bertindak tidak setimpal dengan provokasi yang diterima. Tindak balasnya yang ganas terhadap cemuhan dan hinaan bekas isterinya tidak dapat dipertahan langsung. Serangan ke atas bekas isteri yang sudah meninggal dunia itu berlarutan dan ganas. Oleh itu, tahap yang mana provokasi boleh meringankan perlakuan tertuduh adalah terhad (lihat perenggan 22).

(3) Kepentingan awam dalam kes ini memerlukan pertimbangan terhadap kekerapan berlakunya kesalahan yang bersifat begini. Kepentingan awam juga menghendaki agar hukuman berat dikenakan untuk kesalahan begini. Untuk menyebelahi tertuduh, mahkamah akan mempertimbangkan faktor-faktor mitigasi berikut: (i) tertuduh tiada kesalahan lampau — ini merupakan faktor mitigasi dalam kes ini meskipun ia kesalahan yang berat; (ii) pengakuan bersalah pada peluang yang terawal — di mana pengurangan hukuman adalah antara suku dan satu pertiga, fakta-fakta ganas dan kejam kes ini mewajarkan pengurangan yang sedikit (lihat perenggan 23–24 & 26).

(4) Jika tertuduh tidak membuat pengakuan bersalah pada permulaannya dan perkara tersebut telah melalui perbicaraan penuh, ia berkemungkinan mahkamah akan mengenakan hukuman 16 tahun penjara dengan mengambilkira kepentingan awam, kebersalahan

tindakan tertuduh dan tahap keganasan dan kekejaman dalam kes ini. Walau bagaimanapun, dengan mempertimbangkan selanjutnya keadaan peribadi tertuduh, provokasi yang dilakukan terhadapnya dan pengakuan bersalahnya pada peluang terawal diberikan kepadanya, hukuman yang sesuai adalah tempoh penjara selama 12 tahun, dari tarikh tangkapannya (lihat perenggan 27).]

Notes

For a case on s 304(a) of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1597.

For cases on culpable homocide, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3537–3555.

For cases on mitigating factors, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3804–3836.

For cases on plea of guilt, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3858–3907.

Cases referred to

R v Cascoe [1970] 2 All ER 833 (refd)

Legislation referred to

Penal Code ss 302, 304(a)

Wan Shaharaddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Imran Hadzalie (Eleda Imran) for the accused.

Nallini Pathmanathan JC:

INTRODUCTION

[1] On 17 September 2007, Tegoh bin Aling ('the accused') was convicted of culpable homicide under s 304(a) of the Penal Code ('PC'). He had originally been charged, in July 2004, with the murder of one Kachut binti Tunchit ('Kachut') his former wife, under s 302 of the PC. However when an alternative charge under s 304(a) of the PC was preferred on 4 September 2007, he pleaded guilty. The alternative charge reads as follows in Malay:

Bahawa kamu pada 23 Ogos 2003 diantara 7.00 malam hingga 8.00 malam, di rumah No 16-A, Jalan Dengkil, Kampung Orang Asli Bukit Tampoi, Dengkil, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, dengan niat telah menyebabkan kematian ke atas Kachut binti Tunchit (KPT: 640502-10-7664) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kesalahan membunuh yang boleh dihukum di bawah s 304(a) Kanun Keseksaan.

[2] The charge was translated into the Temuan language by an interpreter. I ascertained that the accused understood the nature and consequences of the alternative plea and was satisfied that he did.

FACTS OF THE CASE

[3] The facts of the case as outlined by the learned deputy public prosecutor show that the accused went to the home of one Kachut Binti Tunchit ('Kachut') at No 16-A, Jalan Dengkil, Kampung Orang Asli Bukit Tampoi, Dengkil on 23 August 2003 at about 7pm. Kachut was at home. A verbal quarrel ensued between the accused and Kachut, who, as mentioned earlier, was his former spouse. In the course of this argument, Kachut made accusations and assertions that both wounded the feelings of the accused and provoked him into a fury.

[4] He was goaded to such an extent that he lunged towards Kachut, pulled her by her hair and hit her head against a pillar of the house twice. He then pushed her onto the floor and knocked her head against the cement rendered floor of the house several times. Next, the accused took hold of a sturdy, thick bamboo pole (exh P8) and hit Kachut in the region of her neck repeatedly. It appears that he forced the bamboo pole against her throat while she was lying on the floor, resulting in multiple fractures of her laryngeal and hyoid cartilages. He dragged her through the house, as evidenced by a trail of blood in the hall and dining room and left her lying in a state of unconsciousness at the rear portion of the house (see exhs P6 A–P). Immediately after that, at about 8pm the accused left the house. Kachut was discovered later that night at about 10.30pm by her stepson who noticed the blood stains in the sitting room. She had, by then, passed away. Her body was covered in blue-black bruises, wounds and injuries.

[5] A postmortem report (exh P7) revealed marks of violence and trauma on the deceased's head, neck, upper limbs and body. Her tongue had been bitten and her tonsils bruised. The hyoid bone and the laryngeal cartilage had multiple fractures. The pathologist concluded that the cause of death was strangulation. The fractures of the hyoid bone and laryngeal cartilage had resulted in an interruption of the airways, causing her to asphyxiate and die.

PLEA IN MITIGATION

[6] Encik Imran Hadzalie, who appeared for the accused made an impassioned plea in mitigation on his behalf. He submitted that:

(a) The accused is aged 48 according to his National Registration Identity Card (NRIC Card), although the registration of his birth was late.

(b) The accused is illiterate and never went to school. Prior to this incident, he worked as a tractor driver. He has been married thrice and has seven children in all. His first marriage was to Kachut, the deceased, in 1978. They had one child of the marriage. The accused divorced her in the late eighties. He then married his second wife and had six children by that marriage. He divorced his second wife and later married his third wife to whom he remains married to date. There are no children of the third marriage.

(c) The accused has no previous convictions.

(d) The accused had pleaded guilty, thus saving the court time and costs.

(e) The circumstances giving rise to the commission of the offence show that there was extreme provocation on the part of the deceased, resulting in the accused becoming enraged and violent towards the deceased, resulting in her death. The deceased had taunted the accused, stating that he was a liar and a cheat as he had failed to take her back as a wife as promised. This resulted in a verbal quarrel. However the deceased then started to mock and ridicule the deceased's religion, culminating in the throwing of the Holy Qu'ran, whereupon the accused who had thus far restrained himself, lost control completely and set upon Kachut, hitting her as set out above. It was submitted that this was the highest form of provocation possible, namely the denigration of religion, and this explained the fury evoked in the accused and his subsequent violence. On these grounds, in summary learned counsel sought a light sentence.

THE PROSECUTION'S SUBMISSIONS

[7] The learned deputy public prosecutor submitted to the contrary. He argued that the violent reaction of the accused which resulted in Kachut's death was entirely disproportionate to the provocation received by the accused from her. Therefore, he said, the court should disregard its practice of affording the accused some credit for his plea of guilt. He urged the court, in the public interest, to impose the maximum possible sentence.

THE LAW

Sentencing principles and guidelines

[8] Section 304(a) of the PC prescribes the statutory ambit for punishment for culpable homicide not amounting to murder where 'the act by which the

death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death'. It provides for the punishment of imprisonment for a term which may extend to twenty years and/or a fine. The discretion to be exercised in arriving at a sentence must be judicially exercised in accordance with established principles. However, as is evident from the broad definition of culpable homicide under s 304(a) of the PC, there are many different circumstances giving rise to this offence that fall within this definition. It is a generic name for a group of offences perpetrated under dissimilar conditions. As a consequence the punishment for such offences which are committed under widely differing circumstances, yet which fall within such a generic definition, are correspondingly varied.

[9] In *R v Cascoe* [1970] 2 All ER 833 Salmon LJ wrote with regards to the offence of manslaughter which is encapsulated, inter alia, by s 304(a) of the PC:

> As for sentence, manslaughter is, of course, a crime which varies very, very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder.

[10] The breadth of circumstances which give rise to the commission of culpable homicide under s 304(a) of the PC requires an equal broad discretion to be accorded to a court on sentencing for the commission of such an offence. As the degree of culpability of the accused in an offence of this nature will vary considerably with the circumstances giving rise to the commission of the offence, the sole common ingredient being death, reliance on case-law or the formulation of guidelines is less than useful to a sentencing court. There is no 'typical case' that affords a starting point for the purposes of imposing a sentence.

[11] However the frequency with which this crime occurs has not abated over time despite the imposition of relatively long sentences of imprisonment. If at all, the incidence and circumstances giving rise to this offence have increased both in numbers and the manner of commission of the offence. This, to my mind, requires emphasis to be placed on general deterrence in an effort to provide a greater measure of security for society. Such public interest requires the administration of justice to enforce the criminal law by imposing sentences that are proportionate to the nature of the crime committed, while avoiding disparity in sentencing.

[12] In this particular case, the culpability of the accused's actions and the extent of violence and brutality that he perpetrated on the deceased are the paramount factors in determining the appropriate range of sentence.

As against this, his background, his prospects for rehabilitation and his remorse are to be taken into account.

Circumstances of commission of the offence

[13] The culpability of the accused's actions cannot be assessed without a full consideration of the facts giving rise to his violent acts. These facts were put forward on behalf of the accused by learned counsel for the accused, Encik Imran Hadzalie. In the course of his plea in mitigation, he set out in detail, the events that occurred on the evening of 23 August 2003. The details set out do not conflict with the Statement of Facts adduced by the prosecution in exh P-4, but amplify those facts and provide the accused's an explanation for his behaviour that evening. In the absence of any indication to the contrary from the prosecution, I accept that it is reasonably possible that the events of 23 August 2003 did occur as stated by the accused.

[14] The deceased, Kachut, lived in a house built by her for the accused, as seen in exh P5A. She was alone at home that evening. The accused and Kachut were married in 1978 in accordance with their customary law. They separated in the late eighties and their marriage was dissolved. Their separation arose as Kachut felt that the accused was not a responsible husband because he had no permanent job. At that time the accused worked in the village and sold such items as he could from the surrounding jungle.

[15] The deceased then married another man but her second husband abandoned her when she fell ill. This happened in the early nineties. Throughout this time, the accused had remained in the same village. He was an object of some ridicule in the village because his former spouse had remarried and he had not. The deceased then pleaded with the accused to take her back. The accused however had by this time become a Muslim and told her that if she wanted to come back to him, she had to become a Muslim too.

[16] At around this time, the accused married his second wife. For a period of several years, the deceased contacted the accused periodically, advising him that she was willing to become a Muslim, but pleading that she be taken back. The accused imposed one condition, namely that he would take her as back as his wife, but would not separate from his second wife. This happened about three to five years before the incident.

[17] Just before the accused and the deceased were to remarry, the accused found out that the deceased had had secret liaisons with other men. The accused was deeply distressed by this information, to the extent that he left the village they lived in and moved to Kenaloi in Negeri Sembilan with his

family. The accused was informed by his family that the deceased had asked the accused to take back his belongings which were still in the house she lived in.

[18] On 23 August 2003, the accused went to the house in the evening at about 7pm. When he entered the house, the deceased started shouting at him calling him a liar and a cheat because he did not take her back as a wife as promised. A verbal quarrel ensued between them.

[19] The accused's version of events is that he controlled himself and informed the deceased that he could not take her back because of her liaisons with other men. This statement provoked the deceased to the extent that she slapped the accused and started scratching and clawing him. Not satisfied with this, she started hurling objects at him, taking anything that came to hand. According to the accused he still did not respond to these attacks, save that he tried to calm her. But the deceased did not stop there. The accused states that the deceased then started ridiculing his religion, Islam and finally even threw the Holy Book, the Al Qu'ran at the accused. At this point, the accused lost his temper and hit the deceased in the manner set out in the statement of facts (exh P4). The deceased maintains that he could not contain himself or hold back his anger when the deceased started mocking and pouring scorn on his religion.

Provocation

[20] It cannot be denied that the provocation afforded by the deceased was of the highest degree. The issue is whether the provocation was sufficient to deprive a reasonable man of his self-control and the means he used to retaliate were reasonable in view of the provocation offered. The test to be applied is that of the ordinary man of the community from which the accused comes, in this instance the Orang Asli community.

[21] It is the view of this court that the denigration of a man's religion, culminating in the throwing of the Holy Book is sufficient provocation to warrant a reasonable man losing his self-control and responding heatedly. While this afforded the accused a defence against the original charge of murder preferred against him, thereby reducing his culpability to an offence under s 304(a) of the PC, it does not provide a defence to the reduced charge. The fact of provocation is however relevant for the purposes of mitigation in that it establishes that the deceased contributed towards the events that took place that night.

[22] It has to be emphasised however, that notwithstanding this level of provocation, the accused reacted wholly disproportionately to the

provocation received. His brutal and violent response to Kachut's taunts and insults was entirely indefensible. He repeatedly struck her head against the cement pillars of the house and then the floor; he then battered her unremittingly with a thick bamboo pole all over her entire body, and finally used the pole to inflict fractures of her right and left hyoid bones and multiple fractures of her laryngeal cartilage resulting in her asphyxiation or strangulation and eventual death. It is evident that the deceased could not defend herself from the fury and violence of the blows which the accused inflicted on her. The attack on the deceased was both prolonged and violent. Therefore the extent to which the provocation serves to mitigate the accused's conduct is limited.

[23] Apart from the facts of the instant case, public interest as alluded to earlier, requires that consideration be given to the frequency with which this offence is committed. Public interest and confidence in the administration of justice requires that severe penalties be meted out for offences of this nature, for the ultimate protection of society. As against this the other mitigating factors relating to the accused are to balanced.

First offender

[24] The accused has no previous convictions and is a first time offender. It is an established practice to give some consideration to the fact that the accused is a first time offender, although the extent to which this can be done in a serious offence is limited. Notwithstanding the gravity of this offence, this is a mitigating factor in the instant case.

Plea of guilt

[25] The accused pleaded guilty as soon as he could upon an alternative charge being read out to him. It was argued for the prosecution that the plea of guilt should not afford the accused any credit or discount on the sentence to be imposed, in view of the gravity of the offence and as the accused's reaction to the provocation in not only hitting the deceased but going on to use a bamboo pole to strike further blows giving rise to asphyxia, was far in excess of a proportionate response to the provocation received. It is indeed true that a plea of guilt does not automatically entitle an accused as of right to a discount on the sentence to be imposed. However, the facts of this case do not show that the accused set out with the intention to cause any form of injury to the deceased that evening. There was no premeditation to cause bodily injury. The accused's failure was in reacting disproportionately to the taunts and insults of the deceased.

A **[26]** The plea of guilt in the instant case, therefore should be accorded some consideration when considered in the entirety of the circumstances. While the normal rule of practice is that the reduction would be between one-quarter and one-third of what would otherwise have been the sentence, the violent and brutal facts of this case warrant a lesser reduction.

B

Comparison of sentences in other cases for a similar offence

[27] As stated at the outset, a review of the case-law relating to sentencing for offences of this nature will reveal a broad range of sentencing reflecting the C varied circumstances as well as the varying degrees of violence in this genre of offences falling within this section of the Penal Code, and linked by the sole common requirement of a death. In the instant case, if the accused had not pleaded guilty at the outset and this matter had gone through a full trial it is likely that I would have imposed a sentence of 16 years taking into D account public interest, the culpability of the accused's actions and the extent of the violence and brutality that was present in the circumstances of the case. Taking into further consideration the personal circumstances of the accused, the provocation afforded to him and his plea of guilt at the earliest possible opportunity available to him, the appropriate sentence to be passed on the E accused in this case is a term of imprisonment of 12 years, which is to take effect from the date of his arrest.

Accused sentenced to 12 years' imprisonment from date of arrest.

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Reported by Andrew Christopher Simon

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